

4-18-2016

TX v US Supreme Court transcript

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - x

3 UNITED STATES, ET AL., :

4 Petitioners : No. 15-674

5 v. :

6 TEXAS, ET AL., :

7 Respondents. :

8 - - - - - x

9 Washington, D.C.

10 Monday, April 18, 2016

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:04 a.m.

15 APPEARANCES:

16 GEN. DONALD B. VERRILLI, JR., ESQ., Solicitor General,
17 Department of Justice, Washington, D.C.; on behalf of
18 Petitioners.

19 THOMAS A. SAENZ, ESQ., Los Angeles, Cal.; on behalf of
20 Intervenor-Respondents in support of Petitioners.

21 SCOTT A. KELLER, ESQ., Solicitor General of Texas,
22 Austin, Tex.; on behalf of Respondents.

23 ERIN E. MURPHY, ESQ., Washington, D.C.; for United
24 States House of Representatives, as amicus curiae,
25 supporting Respondents.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case No. 15-674, United States v.
5 Texas, et al.

6 General Verrilli.

7 ORAL ARGUMENT OF GENERAL DONALD B. VERRILLI, JR.

8 ON BEHALF OF THE PETITIONERS

9 GENERAL VERRILLI: Mr. Chief Justice, and
10 may it please the Court:

11 The Secretary of Homeland Security has
12 decided to defer removal of the class of aliens who are
13 parents of U.S. citizens and LPRs, have lived in the
14 country continuously since 2010, and not committed
15 crimes. That policy is lawful and Respondents concede
16 it is lawful. It is fully justified by the fundamental
17 reality that DHS has resources only to remove a fraction
18 of the unlawful aliens, the aliens presently -- present
19 unlawfully in the country now.

20 This class of aliens is the lowest priority.
21 And there is a pressing humanitarian concern in avoiding
22 the breakup of families that contain U.S. citizen
23 children.

24 The principal --

25 JUSTICE GINSBURG: Couldn't the government

1 simply, as was suggested in one of the briefs, have
2 given these children -- parents of citizens or LPRs,
3 given them identity cards that say "low priority," and
4 would there be any difference between that and what this
5 DAPA Guidance does?

6 GENERAL VERRILLI: That is -- that's a very
7 important point, Justice Ginsburg. That -- that is
8 precisely what deferred action is. Deferred action is a
9 decision that you were -- that you are a low priority
10 for removal, and it's an official notification to you of
11 that decision. And Respondents have conceded that we
12 have the lawful authority to do both things: To make
13 that judgment and to give an identification card.

14 CHIEF JUSTICE ROBERTS: General, maybe it
15 would make logical progression if you began with your
16 standing argument first.

17 GENERAL VERRILLI: Yes. And I think this
18 does lead right into the standing argument.

19 I think the principal bone of contention
20 between the -- the Respondents and the United States is
21 over whether the Secretary can also authorize these
22 people to work and accrue ancillary benefits, and
23 Respondents lack standing to challenge that for three
24 fundamental reasons.

25 First, there's -- the injury is not

1 redressable, because even if they achieve the -- even if
2 they achieve the injunction that they want, barring us
3 from providing work authorization ancillary benefits, we
4 can, for the reason Justice Ginsburg identified, still
5 provide them with deferred action. And under Texas law,
6 they still qualify for a license under deferred action,
7 so there's no redressability.

8 Second, they have not alleged a concrete
9 particularized injury because the costs that they claim
10 now to be an injury are actually the expected and
11 desired result of the policy that exists in current
12 Texas law --

13 CHIEF JUSTICE ROBERTS: Well, but if -- if
14 they change that policy to avoid the injury that they
15 allege, in other words, if they did not confer -- offer
16 driver's licenses to those who are lawfully present
17 because of your policy, avoided that injury, you would
18 sue them, wouldn't you?

19 GENERAL VERRILLI: I'm not sure at all that
20 we would sue them. It would depend on what they did.
21 But the fundamental --

22 CHIEF JUSTICE ROBERTS: No, no. What they
23 did -- I'm hypothesizing -- is that they offered
24 driver's license to everyone, but not those who were
25 here under your -- under DAPA, under your proposal.

1 GENERAL VERRILLI: Chief Justice, the key
2 word in your question is "hypothesize." And that's the
3 point, it seems to me. They have not made that change
4 in their law. What they --

5 CHIEF JUSTICE ROBERTS: No, because they
6 have what seems to me a perfectly legitimate policy, is
7 they want driver's license to be available to people who
8 are lawfully present here. And if you, the Federal
9 government, say, well, these people are lawfully
10 present, that means they have to give a driver's license
11 to however many of them, more than half a million
12 people, who would be potentially eligible for them.

13 And as I understand from your brief, your
14 answer is, well, just don't give them driver's licenses.

15 GENERAL VERRILLI: The current policy is not
16 as Your Honor describes it. The current policy
17 reflected in the existing law and regulation is quite
18 different, and that's the point. They will give a
19 driver's license now to any category of person who has a
20 document from the Federal government, not only saying
21 you're lawfully present, but that you're officially --
22 we're officially tolerating your presence.

23 There are vast numbers of people under
24 existing Texas law that are eligible for a license even
25 though they are not lawfully present. For example, the

1 people who receive deferred action for -- based on
2 childhood arrival. But beyond that, for example, people
3 who are applicants for adjustment of status of whom
4 there are hundreds of thousands --

5 JUSTICE KENNEDY: But suppose -- suppose the
6 State of Texas said this policy that the government has
7 announced is invalid; it violates separation of powers;
8 therefore, we will not issue licenses to this class of
9 persons?

10 GENERAL VERRILLI: Well, I think the
11 point --

12 JUSTICE KENNEDY: It seems to me that the
13 Federal government could say this is not for you to say.

14 GENERAL VERRILLI: That's correct. We could
15 and we probably would. But the point is, they haven't
16 done it. And so in order to establish --

17 JUSTICE ALITO: But that's the whole point
18 of this suit, isn't it? They don't want to give
19 driver's licenses to the beneficiaries of DAPA.

20 GENERAL VERRILLI: Well, I think --

21 JUSTICE ALITO: And unless you can tell us
22 that there is some way that they could achieve that,
23 then I don't see how there is not injury in fact.

24 GENERAL VERRILLI: I disagree with that,
25 Justice Alito, but --

1 JUSTICE ALITO: You disagree with which part
2 of it?

3 GENERAL VERRILLI: I think all of it.

4 (Laughter.)

5 GENERAL VERRILLI: Texas law and policy now
6 does not express that judgment. You look to their law
7 to tell you what their policy is now, and what the
8 policy is now --

9 JUSTICE SOTOMAYOR: General, when you say
10 that, I'm looking at their law. And their law says that
11 they will give licenses to persons granted deferred
12 action on the basis of immigration documentation
13 received with an alien number and from the government.

14 So that's what -- you're saying they've
15 already made the determination that they'll give
16 licenses to people with deferred action.

17 GENERAL VERRILLI: Yes, Justice Sotomayor.
18 That's one thing I'm saying that's quite important, but
19 it even goes beyond that. They're --

20 CHIEF JUSTICE ROBERTS: Oh, but they want to
21 do that. Is there anything wrong with their policy
22 saying if you're lawfully present, you ought to have a
23 driver's license?

24 GENERAL VERRILLI: No, but I guess, Mr.
25 Chief Justice, what I'm trying to get across is that the

1 policy, as it's written down and which, it seems to me,
2 has to be taken as the authoritative statement of the
3 Texas policy, is not just that they want to give
4 licenses to people who are lawfully present. They give
5 licenses to all -- to numerous categories of people who,
6 under the substantive theory of law that they are
7 advancing now, would not be eligible --

8 CHIEF JUSTICE ROBERTS: Okay. So what your
9 argument is then, they should take these people out of
10 eligibility, too.

11 GENERAL VERRILLI: No. My argument --

12 CHIEF JUSTICE ROBERTS: Their argument is,
13 we're going to give driver's license to people subject
14 to deferred action. And you're saying, okay, that's
15 your injury? You can take that away.

16 And I just think that's a real catch-22.
17 If -- if you're injured, you have standing. But you're
18 not injured because you can change your policy and not
19 give driver's license to these people.

20 And I suggest that -- I think you would
21 want -- you would sue them instantly if they said,
22 people here lawfully present under the Federal authority
23 are being discriminated against. It's a preemption
24 argument the government makes on a regular basis. And
25 if you don't, the intervenors will sue them. They've

1 already said that they think that's illegal.

2 GENERAL VERRILLI: The fundamental problem,
3 Mr. Chief Justice, is -- with that theory -- is that it
4 requires this Court essentially to issue an advisory
5 opinion about whether this new law of theirs would, in
6 fact, be preempted. After all, we might think it's
7 preempted, but it's up to the judiciary ultimately to
8 decide whether it's preempted. So in order for that
9 injury to occur, they -- the law -- the judiciary would
10 have to decide it's preempted. And the normal way --

11 CHIEF JUSTICE ROBERTS: So you're saying
12 they would not have injury because they can do this, and
13 you might lose the suit.

14 GENERAL VERRILLI: That's correct. It's --
15 it's hypothetical at this point.

16 JUSTICE KAGAN: I mean, General, I don't
17 understand why you wouldn't lose the suit. I mean,
18 Section 1621 says, "States aren't required to give State
19 benefits to nonqualified aliens, including deferred
20 action recipients."

21 I guess I don't really understand what the
22 basis of a preemption suit would be given that section.

23 GENERAL VERRILLI: Justice Kagan, I'd like
24 to be able to agree with you about that. We don't think
25 1621 actually applies to driver's licenses. And it --

1 depending on what they did, we might or might not think
2 the law is preempted. But until they actually take that
3 step, which would be a significant change from Texas law
4 as it now exists, they really are asking you for an
5 advisory opinion about whether the thing they want to do
6 would be preempted. I mean, if you think about it --

7 JUSTICE ALITO: You're saying they have
8 inflicted this injury on themselves because they have
9 options. And one of the options, and I assume the one
10 that they would like to pursue, is to deny driver's
11 licenses to the beneficiaries of DAPA. And if you're
12 going to make the argument that they lack standing
13 because they have a viable legal option, I think you
14 have to tell us whether, in the view of the United
15 States, it would be lawful for them to do that.

16 GENERAL VERRILLI: So, it would --

17 JUSTICE ALITO: I think the Chief Justice
18 asked you that question before, and you didn't get a
19 chance to answer it. Maybe you could answer it now.

20 GENERAL VERRILLI: It would depend on what
21 they did and why they did it. But it does seem to me,
22 it's fundamental that they have to do it. I mean, think
23 about it this way --

24 JUSTICE ALITO: I mean, if you're saying
25 to -- you're saying to us they lack standing because

1 they have an option, but we're not going to tell you now
2 whether it's a lawful option. You'll have to wait down
3 the -- wait to some point in the future.

4 GENERAL VERRILLI: We might -- depending on
5 what they, we might well think it's unlawful. For
6 example, if they did try to enact this new law that
7 said, we're going to give licenses to everybody we're
8 giving them to now --

9 JUSTICE KENNEDY: But there's Article III
10 standing for declaratory relief all the time. You say
11 this course of action is being compelled on me. I want
12 a declaratory suit that says that it's void.

13 GENERAL VERRILLI: And I think that gets to
14 the point -- that gets to the point, Justice Kennedy.
15 If right now, tomorrow, today instead of suing us they
16 had come into court and said we want a declaratory
17 judgment, we are thinking about -- in light of this
18 change in Federal law, we're thinking about changing our
19 State law to a different law, and we want a declaratory
20 judgment that if we do so, it won't be preempted, I
21 think you would throw that case out in a nanosecond as
22 hypothetical, and that is this case.

23 That is precisely the situation we are in
24 right now. You have to render a judgment on that issue
25 to decide whether they have injury in fact with respect

1 to --

2 CHIEF JUSTICE ROBERTS: Do we really, or is
3 it enough -- is it enough that they would have to be put
4 through litigation in order to escape the policy? You
5 say, well, they can just not do this. And I think
6 it's -- you won't dispute, I think, that they will be
7 put through litigation if they do take that out.

8 GENERAL VERRILLI: I don't think that could
9 be enough, Mr. Chief Justice, because you could have
10 said that in Pennsylvania v. New Jersey or in any number
11 of cases, that they may have to incur some cost with
12 respect to --

13 CHIEF JUSTICE ROBERTS: Well, how is that
14 different? If I -- if I own, say, a parcel of land and
15 it's subject to some government regulatory program that
16 I think is a taking under -- under existing law, why
17 isn't the answer, well, you should go buy some other
18 land that's not subject to it. You can avoid the injury
19 by your own action.

20 And it seems to me that's what you're saying
21 here. Texas says, our injury is we have to give
22 driver's license here, and that costs us money. And
23 your answer is, well, maybe you don't have to give
24 driver's license. Go change the policy.

25 GENERAL VERRILLI: It's a difference

1 between -- in your -- in your proposed hypothetical,
2 Mr. Chief Justice, that's a direct action against the
3 land owner by the government. In this case, we're not
4 acting directly against Texas. We're regulating
5 individual aliens, and there's an indirect and
6 incidental effect on Texas. And that gets to, it seems
7 to me, the deeper and broader point of importance here,
8 which is that if you're going to recognize -- and it
9 would be the first time, I think, in -- in our
10 history -- you're going to recognize that kind of
11 incidental/indirect effect as a basis for allowing one
12 government to sue another -- another, then there's
13 really no limit on the kinds of --

14 JUSTICE SOTOMAYOR: Mr. General, in the
15 normal course of things, let's assume that Texas decides
16 tomorrow to change its law, and it says, now, contrary
17 to what the -- its law says right at this moment that
18 it's not going to give licenses to immigrants with
19 deferred action. Presumably, the immigrant who wants
20 that license would sue the State, correct?

21 GENERAL VERRILLI: Precisely.

22 JUSTICE SOTOMAYOR: And make either an equal
23 protection or any number of preemption argument,
24 whatever. The State could then defend that action,
25 correct?

1 GENERAL VERRILLI: Of course.

2 JUSTICE SOTOMAYOR: And it could raise
3 legitimately full standing to raise any defense in law,
4 correct?

5 GENERAL VERRILLI: Yes.

6 JUSTICE SOTOMAYOR: It could then say that
7 DAPA is illegal --

8 GENERAL VERRILLI: Yes.

9 JUSTICE SOTOMAYOR: -- correct?

10 So there is a cause. It is -- there is a
11 way for it to defend its actions and a way that it will
12 defends its actions.

13 GENERAL VERRILLI: And -- and I think that
14 points out -- I mean, it really goes to what the Court
15 said in *Raines v. Byrd*. You know, it may seem like this
16 is an important issue that is -- is teed up in front of
17 you, and it is an important issue. But, you know, the
18 point is that the legitimacy of the citing issues of
19 this importance come from deciding the context of a
20 concrete case or controversy, and you don't have that
21 here yet --

22 JUSTICE BREYER: Your argument is -- do I
23 have this right? Imagine a Federal statute. Every
24 State must give a driver's license to a member of the
25 Federal armed forces. That's a statute. Second

1 statute: We are transferring one quarter of a million
2 soldiers to Rhode Island.

3 Now, Rhode Island thinks the first statute
4 is unconstitutional, and it also thinks that the second
5 statute, for some technical reason, is unlawful. We're
6 only talking about standing. In that circumstance, does
7 Rhode Island have standing?

8 See, totally analogous. I'm trying to say
9 there is a law, which you say is vague. I'm imagining
10 it's there. It says, Texas, you have to give a driver's
11 license to certain people. And then there's a second
12 law which says, we are sending you a million of those
13 people. Now, all I want to know is: Can Texas, under
14 those circumstances -- your argument is we don't know if
15 that's true here or not -- but under the ones I
16 hypothesize, is there standing, in your opinion?

17 Texas would say the first law is wrong,
18 unconstitutional for some reason. The second is wrong
19 because it technically failed for some reason. Do they
20 have standing to say that?

21 GENERAL VERRILLI: The -- I have to -- I
22 have to caveat my answer, because I think if the second
23 law is an immigration law that says we're going to make
24 an immigration policy judgment that's going to result in
25 additional people being in the State, then I don't think

1 they would have standing.

2 But the fundamental point, I think, of
3 importance here is that the premise that the first -- of
4 the first law that they are required to give driver's
5 licences is not present here.

6 JUSTICE BREYER: I have no doubt it isn't
7 present here. I asked the question to clarify what it
8 is I'm supposed to say if I agree with you.

9 GENERAL VERRILLI: And I tried to answer
10 that and tell you why I think the premise is different.
11 I did try to answer you and then tell you why I think
12 the premise is different.

13 But I -- but I do think -- and I think this
14 is -- you know, there's a sort of a
15 shoe-on-the-other-foot issue here. If you really think
16 that a State can sue the Federal government based on
17 these kinds of indirect and incidental effects, then it
18 seems to me you'd have to also say that if a State
19 decided, for example, that it wasn't going to enforce
20 its minimum wage law anymore, and as a result, the
21 Federal government had to increase its enforcement costs
22 for Federal minimum wage laws in that State, that the
23 Federal government would then have standing to go into
24 State court and say that the State is violating State
25 law? I don't think anybody would think that's a valid

1 claim. But that's just the flip side of this kind of a
2 claim.

3 CHIEF JUSTICE ROBERTS: Is the injury here
4 any more indirect and speculative than the injury in
5 Massachusetts against EPA?

6 GENERAL VERRILLI: Yes. I -- yes. I think
7 definitely, Mr. Chief Justice. I mean, that was
8 obviously a closely-divided Court in that case, but with
9 respect to the majority opinion, it seems to me there
10 were -- there are two fundamental differences, at least
11 two fundamental differences.

12 One is what the Court said is that under
13 the -- under the Clean Air Act, that Congress had
14 charged the EPA with protecting States and others from
15 the effects of air pollution and then given a specific
16 cause of action to the people whose protection EPA was
17 charged with to sue if EPA wasn't doing its job. And
18 that -- and I think this is at page 520 of the
19 opinion -- the Court said was indispensable, was
20 critical to the finding that States got special
21 solicitude and were allowed to sue in a manner where,
22 under Article III, they normally wouldn't be able to
23 sue.

24 In addition -- and in addition, I do think
25 that you do have a quite different situation in that

1 there was no way for Massachusetts to avoid the effects
2 about which it was complaining, and there is a way here.
3 So -- so there is a difference.

4 CHIEF JUSTICE ROBERTS: Maybe I could ask
5 you to switch.

6 GENERAL VERRILLI: I was just going to ask
7 whether I could. Thank you.

8 So I think it's important, again, to frame
9 where we are on the merits here, that the -- their --
10 Texas agrees that the -- that DHS has the authority to
11 defer removal of this class of alien parents of U.S.
12 citizens and LPRs. They agree that that judgment is
13 unreviewable.

14 What we disagree about is whether --
15 principally, whether we also have the authority to
16 authorize them to work and to accrue some ancillary
17 benefits based on that work.

18 CHIEF JUSTICE ROBERTS: Before you get to
19 that, could I ask you a question about the scope of your
20 argument?

21 GENERAL VERRILLI: Sure.

22 CHIEF JUSTICE ROBERTS: Under your argument,
23 could the President grant deferred removal to every
24 unlawful -- unlawfully present alien in the United
25 States right now?

1 GENERAL VERRILLI: Definitely not.

2 CHIEF JUSTICE ROBERTS: Why not?

3 GENERAL VERRILLI: Here are the limits.

4 Because the deferred action has -- over time, there have
5 been built up a set of administrative limits, which I'll
6 talk about, some administrative policy limits, and then
7 there's substantive statutory limits.

8 The administrative policy limits are these:
9 Deferred action has always been for the lowest
10 priorities for removal. And everybody agrees --

11 CHIEF JUSTICE ROBERTS: I'm sorry. By
12 "administrative," you mean by the Executive branch?

13 GENERAL VERRILLI: Correct. Yes. But --

14 CHIEF JUSTICE ROBERTS: So that somehow
15 binds the Executive branch now, the fact that -- I mean,
16 this hasn't been approved by the Executive branch prior
17 to this point, either, and yet it's a fairly significant
18 departure.

19 GENERAL VERRILLI: Let me -- let me -- I
20 don't -- I wouldn't agree with that premise, Mr. Chief
21 Justice, but let me walk through it.

22 So it's -- you've got to be the lowest
23 priority. It's -- there are -- the regulations going
24 back decades that talk about work authorization related
25 to people at deferred action say that there's got to be

1 a tie to a statutory policy that the Secretary has the
2 authority to implement, such things as foreign
3 relations, humanitarian concerns, or keeping -- or
4 family unity when one family member or more is a U.S.
5 citizen. So those -- so you've got to ground it --
6 they've got to be lowest priority; it's got to be
7 grounded in those policy concerns; and then are a number
8 of --

9 JUSTICE SOTOMAYOR: But the Chief is going
10 more fundamentally, General. Those are the parameters
11 that the Executive has set for itself now. He's asking
12 what keeps you from changing those parameters in the
13 future and simply saying, I have -- under your theory of
14 the case, I have discretion to defer action on
15 everybody? I think that's his question.

16 GENERAL VERRILLI: A couple -- a couple of
17 things about that. One is there are statutory
18 constraints that exist now. For example, Congress has
19 told DHS that it has to prioritize the removal of
20 criminal aliens and aliens detained at the border.
21 There's no way we could give deferred action to those
22 populations consistent with --

23 CHIEF JUSTICE ROBERTS: Okay. So not -- not
24 criminals. Who else?

25 GENERAL VERRILLI: Not aliens detained at

1 the border.

2 CHIEF JUSTICE ROBERTS: Okay. So that's
3 another -- criminals --

4 GENERAL VERRILLI: Seems to me it would
5 follow from that, that people who are recently
6 arrived -- recently made it into the country, if they
7 aren't detained at the border, we couldn't give deferred
8 action to them either, because seems to me that would
9 undermine the policy judgment of trying to maximize --

10 CHIEF JUSTICE ROBERTS: Okay. So you have
11 to -- everyone has been here for two years.

12 GENERAL VERRILLI: And then -- and then
13 there are specific statutory provisions that cover some
14 categories of aliens like people with asylum. So then a
15 whole host of things that impose manageable limits.

16 And I think if -- you know, if -- if the
17 Court were to conclude that there is standing --
18 obviously, we don't think there is, but if the Court
19 were to conclude --

20 CHIEF JUSTICE ROBERTS: I'm sorry. Just
21 so -- so the categories you say would have to be
22 excluded are criminals, people detained at the border,
23 and people who've been granted asylum. And other than
24 that, the President could grant deferred removal to
25 everyone here.

1 GENERAL VERRILLI: No. I'm not saying that.
2 You've got to ground it in affirmative policies like --
3 like the one here. And that -- you know, for example,
4 if you look at the OLC opinion, OLC reached the
5 conclusion that DHS couldn't grant deferred action to
6 the parents of the children who -- parents who -- of
7 people who got deferred action for childhood arrival --

8 JUSTICE ALITO: But if the President did
9 what the Chief Justice hypothesized, suppose the
10 President said, you know, there was a time when we had
11 open borders in the United States, and I think that's
12 the right policy, so we're just not going to remove
13 anybody. Who could challenge that?

14 GENERAL VERRILLI: Well, obviously, we're
15 doing more or less the opposite now in terms of what
16 we're doing --

17 JUSTICE ALITO: I understand. It's a
18 hypothetical question. Could anybody, in your view,
19 challenge that?

20 GENERAL VERRILLI: Yeah, I -- yes. I think
21 that would be challengeable under the -- you know, the
22 footnote in Heckler against Chaney. It says if you just
23 decide that you're not going to enforce the law at all,
24 then there may well be a cause of action to challenge it
25 there, and -- but that's -- that's a million miles from

1 where we are now.

2 And I think the key point is that the
3 policy --

4 JUSTICE KENNEDY: Well, it's four million
5 people from where we are now.

6 GENERAL VERRILLI: Well, you know, that's a
7 big number. You're right, Justice Kennedy.

8 JUSTICE KENNEDY: And that's -- and that's
9 the whole point, is that you've talked about discretion
10 here. What we're doing is defining the limits of
11 discretion. And it seems to me that that is a
12 legislative, not an executive act.

13 GENERAL VERRILLI: So --

14 JUSTICE KENNEDY: All of the cases -- the
15 briefs go on for pages to the effect that the President
16 has admitted a certain number of people and then
17 Congress approves it. That seems to me to have it
18 backwards. It's as if -- that the President is setting
19 the policy and the Congress is executing it. That's
20 just upside down.

21 GENERAL VERRILLI: I don't -- I don't think
22 it's upside down. I think it's different, and it's
23 different in recognition of the -- of the unique nature
24 of immigration policy.

25 JUSTICE GINSBURG: General Verrilli, how

1 much -- please, how much of a factor is the reality that
2 we have 11.3 million undocumented aliens in the country,
3 and Congress, the Legislature, has provided funds for
4 removing about four million. So inevitably, priorities
5 have to be set.

6 GENERAL VERRILLI: Right. Exactly.

7 CHIEF JUSTICE ROBERTS: You started out
8 telling us that the enforcement priorities were not at
9 issue; that -- that the problem was the benefits that
10 flow from that, the work authorization, the earned
11 income tax credit, the Social Security benefits, the
12 Medicare benefits.

13 So as I understand it -- and I think this is
14 the point you made -- the other side is not disputing
15 the fact that you have authority to exercise discretion.

16 GENERAL VERRILLI: Correct. And that, I
17 think is the answer to -- that I was going to give to
18 your question, Justice Kennedy. And it seems to me,
19 with respect to this --

20 JUSTICE SOTOMAYOR: Mr. General, before you
21 go on, I -- just to make sure we have -- we're on the
22 same page, you only deport 400,000, not four million.

23 GENERAL VERRILLI: It's not four million.
24 Forgive me.

25 JUSTICE SOTOMAYOR: So we have --

1 GENERAL VERRILLI: -- yes. We have
2 resources for about 400,000. Right.

3 JUSTICE SOTOMAYOR: So we have -- we have
4 basically 10 million, nine hundred thousand people that
5 cannot be deported because there's not enough resources,
6 correct?

7 GENERAL VERRILLI: That's correct.

8 JUSTICE SOTOMAYOR: So they are here whether
9 we want them or not.

10 GENERAL VERRILLI: And the key point is that
11 we have always had a policy that says when you have --
12 when your presence is going to be officially tolerated,
13 you're not here, you're violating the immigration laws
14 by being here. You don't have any rights, but your
15 presence is going to be officially tolerated. When
16 you're in that circumstance, we allow you to work
17 because it makes sense to allow you to work. Because
18 otherwise -- you're going to be here, and otherwise, if
19 you can't work lawfully, you're going to either not be
20 able to support yourself and be forced into the
21 underground economy. We've had --

22 CHIEF JUSTICE ROBERTS: I have to ask you
23 about two pages in your reply brief. On page 16, you
24 quote the Guidance that says, "The individuals covered
25 are lawfully present in the United States." And less

1 than a page later, you say, "Aliens with deferred action
2 are present in violation of the law."

3 Now, that must have been a hard sentence to
4 write. I mean, they're -- they're lawfully present, and
5 yet, they're present in violation of the law.

6 GENERAL VERRILLI: I actually had no trouble
7 writing it, Mr. Chief Justice.

8 (Laughter.)

9 GENERAL VERRILLI: The reason I had no
10 problem writing it is because that phrase, "lawful
11 presence," has caused a terrible amount of confusion in
12 this case; I realize it. But the reality is it means --
13 it means something different to people in the
14 immigration world.

15 What it means in the immigration world is
16 not that you have a legal right to be in the United
17 States, that your status has changed in any way. That
18 you have any defense to removal. It doesn't mean any of
19 those things, and it never has. And -- and so it
20 doesn't -- and so at that fundamental level, we are not
21 trying to change anybody's legal status on the
22 immigration --

23 CHIEF JUSTICE ROBERTS: Lawfully present
24 does not mean you're legally present in the United
25 States.

1 GENERAL VERRILLI: Right. Tolerated --

2 CHIEF JUSTICE ROBERTS: I'm sorry, that --
3 just so I get that right.

4 GENERAL VERRILLI: Yes.

5 CHIEF JUSTICE ROBERTS: Lawfully present
6 does not mean you're legally present.

7 GENERAL VERRILLI: Correct.

8 JUSTICE ALITO: But they are -- the DAPA
9 beneficiaries are -- may lawfully work in the United
10 States; isn't that correct?

11 GENERAL VERRILLI: That's right.

12 JUSTICE ALITO: And how is it possible to
13 lawfully work in the United States without lawfully
14 being in the United States?

15 GENERAL VERRILLI: There are millions of
16 people, millions of people other than the DAPA
17 recipients about whom this is true right now. And this
18 gets to the point of why their reading of Section 1324
19 is completely wrong.

20 JUSTICE ALITO: I'm just talking about the
21 English language. I just don't understand it. How can
22 you be --

23 GENERAL VERRILLI: Well, let me --

24 JUSTICE ALITO: How can you -- how can it be
25 lawful to work here but not lawful to be here?

1 GENERAL VERRILLI: It's -- let me just go
2 through the reality here, and -- and I'll give you some
3 sense of just how disruptive a ruling would be to accept
4 their theory on -- on who can lawfully work in the
5 United States.

6 Right now, since 2008, one category of
7 people who can get work authorization are people
8 applying for adjustment of status. We've given out 3.5
9 million of those to that category of people since 2008,
10 and in the decades before, it was hundreds of thousands
11 of people a year. They are not lawfully present in the
12 United States on the theory of having -- on the sense of
13 having lawful status. People who have applied for
14 cancellation of removal, those are people in removal
15 proceedings now since 2008, we've given out 325,000 of
16 those.

17 JUSTICE ALITO: But those are statutory
18 categories, are they not?

19 GENERAL VERRILLI: No, no. There's no
20 statutory authority to do either one of two things:
21 either to say that they're lawfully present in the
22 United States; there's no authority for that. And this
23 is the key thing for their work authorization argument.
24 There is no statutory authority to grant work
25 authorization to those categories of people --

1 CHIEF JUSTICE ROBERTS: In those other -- in
2 those other categories, did you say that those people
3 were lawfully present in the United States?

4 GENERAL VERRILLI: No. But --

5 CHIEF JUSTICE ROBERTS: But you said that
6 here.

7 GENERAL VERRILLI: But the -- but the key
8 point is that their argument about why we can't give
9 work authorization is a statutory argument. They say
10 that it's under -- that 1324 passed in 1986 extinguished
11 our right to give -- our -- our authority to give work
12 authorization to people whose presence we are officially
13 tolerating.

14 What I'm saying is that that is not a
15 plausible reading -- it's not a plausible reading of
16 the text. There's a 1987 regulation that -- that INS
17 promulgated which considered that very question of
18 whether passage of that statute restricted INS to giving
19 out work authorization only to people who are in the
20 category specifically identified in the statute. INS
21 rejected that as implausible and inconsistent with the
22 theory. That's been on the books for 30 years. It's a
23 part of the Chevron deference.

24 And then the third point --

25 JUSTICE KAGAN: General -- please. I'm

1 sorry. Go ahead.

2 GENERAL VERRILLI: The third point is the
3 consequences point. This argument they are making
4 says -- you know, if you -- if you go through the reg
5 that's in the petition, the Appendix that lists all the
6 different categories of people who get work
7 authorization, their reading of 1324 knocks out like 15
8 or 16 of those categories. It just doesn't -- it's
9 not -- it doesn't just apply here.

10 JUSTICE SOTOMAYOR: Do they have a way of
11 attacking that 1986 --

12 GENERAL VERRILLI: Yes, they could --

13 JUSTICE SOTOMAYOR: -- regulation?

14 GENERAL VERRILLI: Absolutely. They could
15 petition for rulemaking.

16 JUSTICE SOTOMAYOR: And that would be under
17 Section 553(c)?

18 GENERAL VERRILLI: Right. They could
19 petition the --

20 JUSTICE SOTOMAYOR: Did they do that here?

21 GENERAL VERRILLI: No, they did not do that
22 here. If --

23 JUSTICE KAGAN: Could --

24 GENERAL VERRILLI: I'm sorry, Justice Kagan.

25 JUSTICE KAGAN: Could you have done the

1 exact same thing without using that phrase in the DAPA
2 documents?

3 GENERAL VERRILLI: Yeah, absolutely. And,
4 in fact, if the Court thinks it's a problem and wants to
5 put a red pencil through it, it's totally -- it's
6 totally fine. Really. It doesn't -- I -- I understand
7 the -- the issues that it's caused. But its legal
8 significance is a technical legal significance with
9 respect to eligibility for Social Security benefits and
10 for this tolling provision, and that really -- you know,
11 those -- that's the tail on the dog and the flea on the
12 tail of the dog.

13 JUSTICE KENNEDY: You were asked about an
14 APA action. If they brought an APA action, would they
15 be entitled at least to ask for a preliminary injunction
16 while the notice-and-comment procedure was --

17 GENERAL VERRILLI: I don't --

18 JUSTICE KENNEDY: -- commencing?

19 GENERAL VERRILLI: You know, forgive me,
20 Justice Kennedy. I haven't thought about that. I have
21 my doubts if they would be entitled to get a preliminary
22 injunction under those circumstances.

23 JUSTICE KENNEDY: They would have -- they
24 would have standing to object if the rulemaking hearing
25 came out the wrong way.

1 GENERAL VERRILLI: Oh, I think if we're --
2 if we're talking about whether there's a -- a
3 notice-and-comment issue here, I -- you've decided that
4 they have standing. So if they have standing -- if you
5 have standing to get to the notice-and-comment issue
6 here, they'd have standing in a notice-and-comment
7 proceeding, sure.

8 CHIEF JUSTICE ROBERTS: General, when he
9 announced --

10 JUSTICE BREYER: But they don't have
11 standing in the Court, necessarily. I mean, loads of
12 people have standing --

13 GENERAL VERRILLI: Yeah, no --

14 JUSTICE BREYER: -- to bring actions in --

15 GENERAL VERRILLI: Sorry, I wasn't clear,
16 Justice Breyer.

17 If this Court decides -- if this Court gets
18 to the notice-and-comment issue here, this Court will
19 have decided that they have Article III standing. And
20 if they do, then they would then, too.

21 CHIEF JUSTICE ROBERTS: When he announced --
22 when he announced -- the President announced DACA, the
23 predecessor provision, he said that if you broadened it
24 -- this is a quote, "Then, essentially, I would be
25 ignoring the law in a way that I think would be very

1 difficult to defend legally." What was he talking
2 about?

3 GENERAL VERRILLI: So -- so I think two --
4 there's two possible things. One is what DACA does is
5 what DAPA does, which is provide tolerated presence and
6 essentially the ability to work. If he had said, I'm
7 actually going to give these people lawful permanent
8 resident status or legal status, that would be going
9 further.

10 CHIEF JUSTICE ROBERTS: Or say -- or say
11 they were lawfully present.

12 GENERAL VERRILLI: And -- and well, but --
13 but as I said, I -- you know, I really think that --

14 And then -- and then second, the other thing
15 is, you know, maybe he thought he couldn't extend it at
16 that time to DAPA. But, you know, what happened here is
17 that the President and the Secretary went to the Office
18 of Legal Counsel and asked for an opinion about the
19 scope of their authority to -- to -- the scope of this
20 discretionary authority, and they got one. And they
21 exercised it consistently with that and up to the limits
22 of that and no further.

23 And so, you know, I do think whatever the
24 President may have met -- meant, we went through that
25 process, we came to that conclusion, and we -- and acted

1 on that conclusion and respecting the limits that OLC
2 decided.

3 JUSTICE GINSBURG: There's -- there's no
4 challenge to DAPA in it?

5 GENERAL VERRILLI: No, right, which, as a
6 legal matter is no different.

7 If I might reserve the balance of my time.
8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you, General.
10 Mr. Saenz.

11 ORAL ARGUMENT OF THOMAS A. SAENZ
12 ON BEHALF OF THE INTERVENOR-RESPONDENTS
13 IN SUPPORT OF THE PETITIONERS

14 MR. SAENZ: Mr. Chief Justice, and may it
15 please the Court:

16 The Jane Does, three Texas mothers of U.S.
17 citizen children, seek the opportunity to apply for
18 discretionary, temporary and revocable relief from the
19 daily fear that they will be separated from their
20 families and detained or removed from their homes under
21 the current nonuniform and frequently arbitrary Federal
22 immigration enforcement system, which fails to provide
23 any reliable opportunity to be identified as low
24 priority.

25 Their own State of Texas, through this suit,

1 has blocked the Guidance that would secure the Jane Does
2 an opportunity to step forward, register and apply and
3 obtain a timely decision with respect to deferred
4 action. Texas does so based on asserted indirect and
5 speculative budgetary injury that contradicts the
6 State's own legislative decision, after balancing all
7 policy considerations to subsidize and encourage the
8 acquisition of driver's licenses with no annual or
9 cumulative limit on subsidies in that form.

10 CHIEF JUSTICE ROBERTS: Do you think it
11 would be illegal if Texas adopted a policy saying
12 everyone lawfully present in Texas except people subject
13 to DAPA get a driver's license?

14 MR. SAENZ: I think it would be, in candor,
15 subject to a challenge that would revolve around the
16 circumstances and the reasoning behind that new
17 legislation. It's important, of course, to note that
18 Texas has not done that. And there's no indication that
19 its legislative process would result in determining that
20 its previous decision that subsidized licenses make
21 sense without limit has some endpoint. The circumstance
22 that you've described where it specifically targets one
23 set of deferred action recipients would certainly raise
24 questions. It would be resolved if --

25 JUSTICE SOTOMAYOR: How about if they just

1 said -- let's take it out of DAPA -- if they just said,
2 you know something? There's too many deferred action
3 people. It doesn't matter why you're deferred --
4 political refugee, the people waiting for a different
5 status -- we're just going to do it for everybody.

6 MR. SAENZ: In that circumstance, I think
7 it, too, would be subject to challenge. It would be a
8 different challenge because of circumstances, and the
9 reasoning would be different. There would be equal
10 protection claims. There might be preemption claims.
11 And those would be resolved in the kind of concrete
12 clash of real interest that this Court has indicated
13 Article III supports. You would have the State of Texas
14 defending a decision it has made to change its law and
15 to keep that law in place. Then you would have
16 aggrieved individuals who would have been denied a
17 driver's license because of that change.

18 JUSTICE SOTOMAYOR: Not every State grants
19 licenses to deferred action individuals, do they?

20 MR. SAENZ: That's correct, Your Honor. In
21 this case, it would arise in the context of a change
22 which could raise equal protection concerns to be
23 resolved in the kind of concrete clash of interest that
24 this Court has indicated are behind Article III.

25 I think it's important to note that not only

1 has Texas not changed its policy --

2 JUSTICE KAGAN: Do I take it from the way
3 you are phrasing this that you actually think that the
4 equal protection concerns would be more serious than the
5 preemption concerns?

6 MR. SAENZ: I think it depends on the
7 circumstances of how Texas is to make its decision. All
8 the more reason to wait until it's actually made a
9 decision through a legislative process where there would
10 be a record of why the legislators chose to change from
11 a policy that currently provides licenses to anyone who
12 can demonstrate that they are authorized to be in the
13 United States, to something that would leave some folks
14 in that category out.

15 If they would decide that tolerated presence
16 is not authorization, for example, we would have a
17 record of why they made that decision. Of course, we
18 are not there yet because Texas has not made a decision
19 to change what its current policy is, and there is no
20 indication that --

21 JUSTICE BREYER: In -- in the record, that
22 you're more familiar with than I, and I would ask the
23 other side the same question, I've read in the briefs
24 quite a lot that the reason that they don't want to give
25 driver's licenses to these 500,000 extra people is it's

1 expensive.

2 Is there any other reason that's in this
3 record, such as -- we could imagine other reasons. Is
4 there any serious effort to rest their claim? We don't
5 want to give them licenses on anything other than money?

6 MR. SAENZ: Yes, Your Honor.

7 JUSTICE BREYER: What?

8 MR. SAENZ: Governor Abbot has indicated
9 that, in the record --

10 JUSTICE BREYER: In the record here.

11 MR. SAENZ: Yes, it's in the record here, I
12 believe, Your Honor, that, in fact, this is a political
13 dispute. They do not agree with the policy adopted by
14 the Administration, though they have conceded in this
15 case that it is within the Executive's discretionary
16 authority.

17 JUSTICE BREYER: You're talking about in
18 general. I'm focusing on the narrow question of how
19 Texas is hurt, specifically, not a political
20 disagreement. How are they specifically hurt by giving
21 these people driver's licenses?

22 MR. SAENZ: Your Honor, they --

23 JUSTICE BREYER: One way is it costs them
24 money.

25 MR. SAENZ: Yes.

1 JUSTICE BREYER: Are there other ways?

2 MR. SAENZ: No, Your Honor. That's the only
3 thing they put forward in one --

4 JUSTICE BREYER: That's the answer.

5 MR. SAENZ: And, in fact, it shows that they
6 believe they would face additional expenses, though
7 there's not really enough to conclude that it would
8 change the State's previous determination, taking into
9 account those costs from every subsidized license --

10 CHIEF JUSTICE ROBERTS: Isn't -- isn't
11 losing money the classic case for standing?

12 MR. SAENZ: It's a classic case for a
13 private individual, Your Honor, but here, we're talking
14 about a State that has made a decision, as States often
15 do, to spend money by subsidizing licenses because it's
16 balanced other considerations, including --

17 CHIEF JUSTICE ROBERTS: We said in
18 Massachusetts against EPA that we have a special
19 solicitude for the claims of the States.

20 MR. SAENZ: Yes. In that case, it was not a
21 financial claim. As you know, Your Honor, it was a
22 claim related to the State's quasi-sovereign interest
23 over land.

24 In addition, as General Verrilli has
25 indicated, there was a procedural right within the Clean

1 Air Act that does not exist here. Indeed, if a
2 procedural right were to be established under the APA
3 itself, there is no limit to the number of States that
4 could come forward to challenge any domestic policy of
5 any kind by this or any future Administration.

6 JUSTICE ALITO: If an employer took the
7 position that the employer was not going to hire a DAPA
8 beneficiary because the employer believes that they are
9 not -- that they are not lawfully authorized to work,
10 would prefer someone else over them, could that person
11 sue on any theory of discrimination, for example, under
12 Section 1981?

13 MR. SAENZ: They could, Your Honor. And --
14 and the outcome of that case, I think, has not been
15 clearly established by precedent so far. But it would
16 be a clash between folks with concrete interest, an
17 employer who wants to hire someone, not the individual
18 who --

19 JUSTICE ALITO: If that's true then, DAPA
20 gives them a legal right. It's more than just putting
21 them in a low-priority prosecution status.

22 MR. SAENZ: I think it's important to note,
23 Your Honor, that work authorization is a separate
24 determination from deferred action itself. Not everyone
25 who receives deferred action will receive work

1 authorization. I also think --

2 JUSTICE ALITO: But work authorization, in
3 your view, gives them a legal right they did not have
4 before.

5 MR. SAENZ: It gives them the right to work
6 with authorization, certainly. However, I also need to
7 go back to standing and point out that work
8 authorization has nothing whatsoever to do with driver's
9 licenses in Texas, where the test is authorized to be in
10 the U.S. --

11 JUSTICE GINSBURG: When you -- when you
12 answered the question about -- you said there might be a
13 1981 suit. You are not saying who would win that suit.

14 MR. SAENZ: That's correct.

15 JUSTICE GINSBURG: You're saying it's a
16 question. Not that they have a legal right, but anyone
17 can sue. You can always sue.

18 MR. SAENZ: It's far from clear, I think.
19 The precedent is not clear enough to determine the
20 outcome of that case.

21 JUSTICE ALITO: What is -- but what is your
22 position on that?

23 MR. SAENZ: Our position would be that it is
24 something to be litigated. In fact, to be -- in all
25 candor, we have litigated it to a settlement. So, no,

1 no established precedent to make it clear one way or the
2 other.

3 JUSTICE ALITO: But you believe they do have
4 the right?

5 MR. SAENZ: They do have work authorization,
6 and that certainly means that they ought not be subject
7 to unreasonable discriminatory bases for denying their
8 work. It's different from when they don't have work
9 authorization. But going back to the work
10 authorization, it has no relationship to the driver's
11 licenses. In fact, they could receive licenses without
12 ever applying or receiving work authorization.

13 There's no connection between the two.
14 Therefore, any concerns about work authorization would
15 not redress -- redress the injury behind standing of the
16 State of Texas.

17 JUSTICE ALITO: In the Whiting case a few
18 terms ago, the Court upheld an Arizona statute that
19 imposed pretty severe civil penalties on an employer who
20 employed individuals who were not authorized to work.
21 So if an employer in Arizona hires DAPA beneficiaries
22 and the State attempts to impose those civil penalties
23 on that employer, I assume that you believe that DAPA
24 would provide a legal defense to that?

25 MR. SAENZ: I believe there would be a

1 defense, but before that, because the Whiting case
2 involved a requirement to use either by system under the
3 verified system, those who were work authorized, whether
4 through deferred action or otherwise, should come back
5 as authorized workers.

6 So I think the State of Arizona, which
7 premised its statute in part to receive this Court's
8 blessing of that statute on relying on Federal decision
9 makers, would not be in a position to engage in what
10 you've described.

11 JUSTICE ALITO: Well, prior to DAPA, if the
12 employer had employed these individuals, the employer
13 would be subject to those penalties, would it not?

14 MR. SAENZ: That is correct.

15 JUSTICE ALITO: And after DAPA, it would not
16 be.

17 MR. SAENZ: Work authorization is an
18 authorization to work that is separate from the
19 deferred-action determination. Basically, the State of
20 Texas has conceded the deferred-action determination and
21 seems to be focusing on work authorization. But that
22 work authorization has absolutely no relationship to the
23 alleged injury of driver's licenses.

24 I see my time is up, Your Honor.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Mr. Saenz.

2 General Keller.

3 ORAL ARGUMENT OF SCOTT A. KELLER

4 ON BEHALF OF THE RESPONDENTS

5 MR. KELLER: Thank you, Mr. Chief Justice,
6 and may it please the Court:

7 DAPA is an unprecedented unlawful assertion
8 of executive power. DAPA would be one of the largest
9 changes in immigration policy in our nation's history --

10 JUSTICE SOTOMAYOR: How can you say that? I
11 mean, we have the Fairness Act that happened in 1990.
12 It granted basically the same thing, deferred action and
13 work authorization, to 1.5 million people out of 4
14 million. That was a -- 40 percent of the immigrant
15 population of the time was affected. Here, the best
16 estimate is that only 35 percent are affected.

17 So at least once before, the President has
18 taken action that has a greater percentage effect than
19 now. So why is it the largest? Is it the number of
20 people?

21 MR. KELLER: Well, the Family Fairness
22 Program, first of all, was done pursuant to statutory
23 authority. It was a voluntary departure program. It
24 was not an extra statutory deferred action program.

25 Also, I believe only 47,000 people actually

1 got relief there.

2 And what Congress did in 1996 after the
3 Family Fairness Program --

4 JUSTICE SOTOMAYOR: Well, that's because
5 Congress decided to step in. Here, we have a Congress
6 that's decided -- some members of the Congress have
7 decided they don't like it, and so Congress has remained
8 silent. It doesn't mean that at some later point after
9 the election or whenever, Congress can't step in and do
10 what it wants to do.

11 MR. KELLER: But -- but, Justice Sotomayor,
12 I think that's backwards. Congress has to grant the
13 statutory authority first for the Executive to be able
14 to act. And to do so, on a question that's of this deep
15 economic significance, it would have to do so expressly.

16 JUSTICE SOTOMAYOR: You know, you keep
17 saying that, "deep economic significance." Those nearly
18 11 million unauthorized aliens are here in the shadows.
19 They are affecting the economy whether we want to or
20 not.

21 The answer is, if Congress really wanted not
22 to have an economic impact, it would -- it would allot
23 the amount of money necessary to deport them, but it
24 hasn't.

25 MR. KELLER: But what Congress did in 1986

1 with work authorization, and 1996 with benefits, is it
2 restricted work and benefits as an alternative mechanism
3 to enforce immigration law. Those judgments acknowledge
4 there are going to be people in the country that are
5 unlawfully present, and yet, Congress put forward those
6 barriers to work and to benefits precisely to deter
7 unlawful immigration. What the Executive is trying to
8 do here is flout that determination.

9 JUSTICE SOTOMAYOR: Except that the -- the
10 work authorization ability of the Attorney General to do
11 has been clearly stated since 1986, and Congress hasn't
12 taken that away. It may at some later point, but it
13 still has not undone the 1986 regulation.

14 MR. KELLER: But in 1986, Congress passed a
15 comprehensive framework for combatting the employment of
16 unauthorized aliens. That was a decision to repudiate
17 the past practice and enact a general Federal ban on the
18 employment of unauthorized aliens.

19 JUSTICE SOTOMAYOR: And -- and the
20 regulation permitting the Attorney General to give work
21 authorization to deferred-action individuals has stood
22 since that time.

23 MR. KELLER: But when that regulation was
24 passed in 1987, the Executive said that the number
25 covered by that regulation was so small as, quote, "to

1 be not worth recording statistically," unquote, and,
2 quote, "the impact on the labor market is minimal,"
3 unquote.

4 So regardless of what Congress may have
5 acquiesced to afterwards, that regulation has always
6 been known as being for a small class of individuals
7 for deferred action.

8 JUSTICE SOTOMAYOR: But it's been applied to
9 a large class. It was applied to a large class in 1990.
10 1.5 million out of four million. 40 percent of the
11 illegal population. That was a fairly significant
12 number, and Congress didn't act thereafter. In fact, it
13 expanded the program the President had started.

14 MR. KELLER: No. The 1990 Family Fairness
15 Program was voluntary departure with statutory
16 authority. Congress responded in 1996 by capping it at
17 120 days. And the Executive acknowledged that when
18 Congress did that, it could no longer authorize
19 employment under that voluntary departure program.

20 JUSTICE SOTOMAYOR: Exactly.

21 MR. KELLER: But here, with deferred action,
22 when they've only -- the Executive has only been
23 granting 500 to 1000 deferred action permits a year,
24 there's no way Congress would have acquiesced to
25 granting four million permits than in a program like

1 this --

2 JUSTICE SOTOMAYOR: Well, it has -- it has
3 acquiesced to larger numbers of Salvadorians,
4 Guatemalans, Hondurans, Haitians, Chinese, the TNU visa
5 applications, those numbers have been much larger than
6 the limited numbers you're quoting right now.

7 MR. KELLER: And those programs would have
8 been under temporary protective status; humanitarian
9 parole, deferred enforced departure, which is justified
10 -- and has been, at least, under the President's Article
11 II power, and there's no suggestion that -- here DAPA is
12 unprecedented because this is a extra statutory deferred
13 action program that is not bridging lawful status. The
14 aliens do not have a preexisting status, and they don't
15 have an eminent status.

16 JUSTICE KAGAN: General, could I take you
17 back a few steps? General Verrilli said a couple of
18 times that you've essentially conceded the legality of
19 DAPA taking out the work authorization and the Social
20 Security benefits; is that correct?

21 MR. KELLER: No. I'll be very clear. When
22 the Executive is forbearing from removal on a
23 case-by-case basis, that is what this Court in Reno
24 noted was deferred action enforcement discretion. But
25 when the Executive is transforming unlawful presence

1 into lawful presence, and granting eligibility for work
2 authorization and Medicare --

3 JUSTICE KAGAN: Let me make sure I
4 understand that. You're saying that the government
5 could do this case-by-case, one by one with respect to
6 all the people in the class, but that the government
7 cannot identify the entire class and say we're
8 forbearing from enforcement; is that correct?

9 MR. KELLER: While that would be a harder,
10 tougher case, I do believe that they could do it class
11 based if they were simply forbearing from removal.

12 JUSTICE KAGAN: So that's what I asked
13 originally. If they were simply forbearing from
14 removal, and there was not work authorization attached
15 to it, and there was not Social Security or any other
16 benefits attached to it, are you conceding that?

17 MR. KELLER: In this case, given that they
18 are removing 400,000 people a year, we admit that they
19 could do forbearance from removal. But what they can't
20 do is grant authorization to be in the country.

21 There's a --

22 JUSTICE GINSBURG: Can I -- can I ask you
23 specifically? You have a statement in your brief, and
24 that's -- it says that the Executive could give cards,
25 identification cards to all these people saying "low

1 priority." Are you adhering to that? Is -- is that
2 what -- what you mean? These people you're objecting to
3 work authorizations, Social Security, but the
4 government, not one by one, but to give everyone who
5 fits into this category a card that says low priority?

6 MR. KELLER: The government, as part of its
7 enforcement discretion, could do that. But that's very
8 different than what they're doing here where they're
9 granting lawful presence. And that matters because
10 that's why we have to grant driver's license. That's
11 why they get --

12 JUSTICE KAGAN: General, are you -- are you
13 just referring to that single phrase in the DAPA
14 memorandum? Is that what you're referring to? Because
15 General Verrilli, of course, says you could strike that
16 phrase today if you wanted to; that that phrase really
17 has no legal consequence whatsoever; that all this
18 document does is do exactly what you said, which is to
19 grant forbearance, to tell people we are -- you are not
20 our enforcement priority, we are not going to deport you
21 until we say otherwise, which we can tomorrow too.

22 MR. KELLER: That lawful presence phrase is
23 key because that's the first time in a deferred-action
24 program the Executive has taken that position. But even
25 if that phrase were struck, that would still not cure

1 the defect. And the reason is because what the
2 Executive is doing when they're granting deferred action
3 is they are affirmatively granting a status. And we
4 know that from their own benefits regulations, which say
5 -- this is H.C.F.R. 1.3. Sub A says lawfully present
6 qualifies if you're in deferred action status. And then
7 sub B says, well, just because we're forbearing from
8 removal, that doesn't necessarily mean that you're
9 lawfully present.

10 And so what is going on here is a
11 transformation of deferred action from what this Court
12 recognized in Reno to something far more than
13 forbearance from removal. It is granting a status, and
14 that status then entails certain things beyond even
15 Medicare and Social Security. For instance --

16 JUSTICE KAGAN: I guess -- I really did want
17 to know, just take out the work authorization, take out
18 the Social Security, and take out that phrase. Can the
19 -- can the government say to all of these people, and
20 say it all at once, not one by one, yes, you're a low --
21 all of you are low priority, and we will not be coming
22 after you, and we will not deport you unless we change
23 our minds.

24 MR. KELLER: And Justice Kagan, they can do
25 that, and they can do that under the unchallenged

1 prioritization memo. But what they can't do is say it's
2 deferred action that grants a status under the benefits
3 regulation --

4 JUSTICE KAGAN: I think that's just a label.
5 Can they do that?

6 MR. KELLER: It is a label, but it's a label
7 that Congress created --

8 JUSTICE KAGAN: Well, my hypothetical is --
9 I mean, you're suggesting that the label has some legal
10 consequence. And my hypothetical is we just say to
11 these however many million people it is, you will not be
12 deported unless we change our minds. Can they do that?

13 MR. KELLER: If that's all they were doing
14 yes. But as soon as they link it --

15 JUSTICE KAGAN: Even though it's many
16 millions of people they could do that? And they can do
17 it all at once.

18 MR. KELLER: Yes, as long as they're not
19 abdicating. And here, we are not challenging the
20 prioritization --

21 JUSTICE KAGAN: Okay. So if that's right,
22 then it seems to me your real gripe here -- and you --
23 maybe it's a real gripe -- your real gripe here is to
24 the work authorization piece and to the benefits pieces;
25 is that right?

1 MR. KELLER: And the granting of lawful
2 presence, because that is what's going to --

3 JUSTICE KAGAN: Well -- and that's just a
4 label that General Verrilli says they could strike out
5 in a moment.

6 MR. KELLER: Well, that's -- that's their
7 position, but that's wrong. And the reason it's
8 wrong --

9 JUSTICE KAGAN: Well, it's their memorandum.

10 MR. KELLER: It is their memorandum.

11 (Laughter.)

12 MR. KELLER: And it's --

13 JUSTICE ALITO: But isn't it a statutory
14 term?

15 MR. KELLER: It is --

16 JUSTICE ALITO: Does the term "lawful
17 presence" appear in statutes enacted by Congress?

18 MR. KELLER: It does. It appears in IIRIRA,
19 the re-entry bar, it appears in the Social Security and
20 Medicare's -- it -- it appears in the gun possession
21 statute. "Lawful presence" allows an alien to possess
22 guns. That's the Oriana case that we cite from the
23 Fifth Circuit. And their treating it is also allowing
24 advanced parole, which we now know apparently some DACA
25 recipients have gotten green cards and a path to

1 citizenship.

2 JUSTICE KAGAN: But then it seems to me,
3 General Keller, that your -- that what you should be
4 attacking is not DAPA. What you should be attacking is
5 the work authorization regulations that the DHS, or
6 before that the INA, has had for 30 years. Or you
7 should be attacking other connections that DHS is making
8 with respect to these people, but not DAPA itself.

9 MR. KELLER: But Justice Kagan, I think it
10 is DAPA itself that we're challenging. And the reason
11 why is because that is what is transforming unlawful
12 conduct into authorized lawful conduct --

13 JUSTICE GINSBURG: Where does it say that in
14 DAPA? We have the DAPA directive. I didn't see
15 anything in it about work authorization or about Social
16 Security.

17 MR. KELLER: The DAPA directive does not
18 mention Social Security. It does mention work
19 authorization. This is Pet. App. 413a. And I'll quote
20 from it: "Deferred action means that for a specified
21 period of time, an individual is permitted to be
22 lawfully present in the United States."

23 Now, the Executive wants to take the
24 position that that has no legal consequence. Of course,
25 the OLC memo at JA 76 -- and this has been misquoted in

1 their reply brief -- said that what's going on with
2 tolerated presence is it is -- the forward action will
3 be toleration of an alien's continued unlawful presence.

4 Now, if it's continued unlawful presence,
5 they're not authorized to be in the country; we don't
6 have to issue driver's license. They can't get deferred
7 action and gun -- sorry -- they can't get Medicare,
8 Social Security, gun possession.

9 JUSTICE GINSBURG: You tie the driver's
10 license to work authorization? Let's say somebody is in
11 this deferred status but isn't working. Do they --
12 under Texas law, do they get driver's licenses?

13 MR. KELLER: Under Texas law -- and this is
14 our Texas statute -- if someone is authorized to be in
15 the United States, they're eligible for a driver's
16 license.

17 JUSTICE GINSBURG: And it -- it sounds like
18 they don't have to have any work authorization.

19 MR. KELLER: That's correct. They need to
20 be authorized to be in the country.

21 But to give some context to how this works,
22 we have to rely on the Federal government immigration
23 classifications. I mean, we determine whether someone
24 is eligible for a driver's license. We run that through
25 the Federal save background system. So we ask the

1 Federal government, is this individual authorized to be
2 in the country? They say yes or no.

3 CHIEF JUSTICE ROBERTS: Well, the government
4 also says you don't have to do that, or maybe you don't
5 have to do that and maybe -- maybe or not they won't sue
6 you. But why don't you go ahead and not give them
7 driver's license?

8 MR. KELLER: Well, I -- I think, as
9 Your Honor had suggested before, that we are in a
10 catch-22 here. Either we have to not incur millions of
11 dollars of financial harm, which -- which is a
12 quintessential Article III injury, or we have to change
13 our law and somehow we have to come up with a different
14 background check system. We wouldn't have a uniform
15 policy.

16 JUSTICE SOTOMAYOR: I'm sorry. How does
17 somebody get a license in Texas? I know how to do it in
18 New York and Washington, because I lived in both places.
19 But I don't know how to do it in Texas. Do you go up,
20 and you do what?

21 MR. KELLER: You -- you would go to a
22 Department of Motor Vehicles. You would show the
23 documentation showing who you are and that you're
24 eligible for a license.

25 Now, in the context of aliens -- and this is

1 at JA 377 to 382 outlining the process -- then the State
2 verifies that the individual has authorization to be in
3 the country. And that's sort of the Federal --

4 JUSTICE SOTOMAYOR: All right. Now, I do
5 know, because I've experienced it, that lines are very
6 long at DMVs. Sometimes people wait the entire day.
7 And I know that they leave the next day when they
8 haven't gotten to them. And they keep coming back.
9 It's not an ideal situation. Most States, to avoid the
10 frustration, do ramp up, but many States don't. People
11 just keep coming back until their license can be
12 processed.

13 So why is it that you have to spend all this
14 money? Why can't you just have your regular process and
15 let people wait on line?

16 MR. KELLER: Well, first of all, under the
17 Federal REAL ID Act, if our State's driver's license
18 recipients want to be able to use that license to get
19 through airport securities, TSA security, there has to
20 be integrity in the license for the Federal government.
21 And so we have to check whether an alien is actually --

22 JUSTICE SOTOMAYOR: Fine. I was just
23 saying, why do you have to ramp up? This -- I mean, one
24 of the allegations -- I haven't really gone through it
25 carefully enough or assume it's true -- claims that your

1 affidavit estimating losses in your process is made up
 2 basically because A, there's already a built-in profit
 3 from profiting licenses of \$25, that you really don't
 4 know if you have to add all this personnel, because
 5 every five million people are not going to walk into DMV
 6 in one day. And that the numbers are going to be much
 7 less no matter what, because not everybody -- not all
 8 5 million are going to want licenses to start with.

9 So the question I have is, why do you have
 10 to ramp up? Why can't you just let people wait on line?

11 MR. KELLER: Yeah. So this is at JA 377 to
 12 382. And the reason is, is because there's going to be
 13 a spike in the applicants for driver's licenses, and
 14 there are much more to do than simply granting a
 15 license. There would have to be processing the
 16 paperwork, making other determinations.

17 But in any event, that --

18 JUSTICE SOTOMAYOR: But you do that in the
 19 speed you do it in. Meaning, I got a temporary piece of
 20 paper when I was there, and it took weeks for me to get
 21 the regular license while the motor vehicle bureau did
 22 what it was going to do as fast or as slow as it wanted
 23 to do it.

24 MR. KELLER: Well, and here, we have a
 25 factfinding that we would incur these costs. Neither

1 parties or my friends on the other side of -- said that
2 this clear error. The budget document --

3 JUSTICE SOTOMAYOR: This is a jurisdictional
4 standing question.

5 MR. KELLER: It is a jurisdictional standing
6 question.

7 JUSTICE SOTOMAYOR: Do we just accept at
8 face value something that might -- might not be true?

9 MR. KELLER: But we have --

10 JUSTICE SOTOMAYOR: Can we give you standing
11 just on the basis of you saying, I'm going to do this
12 when it makes no sense?

13 MR. KELLER: We have a factfinding here.
14 They have not alleged it's clear error. We also have
15 declarations in from Wisconsin and Indiana that have not
16 been challenged. The bottom line is, if we're going to
17 have to issue more driver's licenses, it's going to cost
18 more money.

19 CHIEF JUSTICE ROBERTS: Justice Breyer.

20 JUSTICE BREYER: I would like to ask a
21 question.

22 The only thing I found here is about money,
23 really. If there's something else that's worrying you,
24 it's -- it's sort of hidden. But money is money; I
25 understand that. And my question is about standing.

1 And this is technical, but it's important to me.

2 Looking at the briefs, awful lot of briefs,
3 senators, both sides. Awful lot of briefs from States,
4 both sides. Members of Congress. Why? Because this
5 has tremendous political valence. Keep that in mind.

6 Now, keeping that in mind, let's go back to
7 two old cases which are scarcely mentioned. But old
8 Supreme Court cases never die --

9 (Laughter.)

10 JUSTICE BREYER: -- unless, luckily, they're
11 overruled. And a few have been. They're submerged like
12 icebergs.

13 (Laughter.)

14 JUSTICE BREYER: The one I'm thinking of is
15 Frothingham v. Mellon, Massachusetts v. Mellon. And
16 there, in those cases, the Federal government had given
17 something to some people. There were beneficiaries.
18 Other people wanted to sue because they said that means
19 we're going to have to pay more money. And the Court
20 said, you other people from Massachusetts, I'm sorry
21 Massachusetts lost, but lo and behold, it did.

22 That's just because I'm from Massachusetts.

23 (Laughter.)

24 JUSTICE BREYER: But the point is they lost,
25 because, says the Court, we can't let you just sue on

1 the basis that you, as a taxpayer, will have to spend
2 more money. Because if we do, taxpayers all over the
3 country will be suing in all kinds of cases, many of
4 which will involve nothing more than political
5 disagreements of all kinds. And before you know it,
6 power will be transferred from the President and the
7 Congress, where power belongs, to a group of unelected
8 judges.

9 And for that reason, we say you individuals
10 who will have to pay more money will; cannot just sue on
11 that basis. And as for the State, it cannot represent
12 you parens patriae because this is between the Federal
13 government and the citizens. They're the ones who have
14 to pay. And as far as Massachusetts is concerned,
15 again, bringing up to a case that they won, that was
16 their own coastline. And that's not money. That's the
17 physical territory belonging to Massachusetts. And, of
18 course, they have standing to protect that.

19 Now, I want your -- think for a second. I'm
20 finished. You see -- you see my point. And I want to
21 know how you get around that, Frothingham, Massachusetts
22 v. Mellon, that when you give a benefit here, hurt the
23 taxpayer via money over there, he doesn't have the kind
24 of interest that gives him standing.

25 MR. KELLER: First, we're raising financial

1 harms from our own State's fisc. That's not a *parens*
 2 *patriae*. And we're also raising sovereign harms, and
 3 that's *Massachusetts v. EPA*. We have ceded to the
 4 Federal government the authority to determine who's
 5 lawfully present within the borders of the 26 States.
 6 Now --

7 JUSTICE BREYER: Well, sovereign harms, you
 8 realize, would follow a *fortiori*, because if a State
 9 cannot sue and its citizens cannot sue to stop the Feds
 10 from giving somebody a benefit on the ground that it
 11 will cost the State or the individuals more money,
 12 surely they cannot sue just by announcing it requires a
 13 change in law in general, or because it requires --
 14 hurts our sovereign interest, for then every case of
 15 political disagreement where States disagree would come
 16 before the Court.

17 MR. KELLER: Well, but I think a lot of
 18 those cases would be taken care of through causation
 19 requirements, injury-in-fact requirements, and the zone
 20 of interest test, for instance, the adjusted gross
 21 income example and the veterans benefits example that
 22 the other side has brought up. I think that all those
 23 cases would be screened out through the zone-of-interest
 24 test.

25 Here, we put forward over a thousand pages

1 of evidence into the preliminary injunction record with
2 over a dozen declarations and have factfindings
3 establishing exactly what Arizona v. United States said,
4 which is that the States bear the consequences of
5 illegal immigration.

6 And when we can come to court and show a
7 concrete injury and a policy that is causing that
8 injury, and by enjoying that policy, we wouldn't have to
9 incur either the financial harm or the sovereign harm,
10 that's precisely when --

11 JUSTICE SOTOMAYOR: Well, but that --

12 MR. KELLER: -- you have Article III
13 cases --

14 JUSTICE SOTOMAYOR: -- that really pits the
15 States against every Federal agency. And any harm,
16 financial harm that indirectly flows from a change in
17 policy would be subject to attack.

18 Let me give you a prime example. Okay?
19 Imagine Texas passed a law forbidding its State pension
20 plan from investing in any financial company whatsoever
21 that the Federal Stability Oversight Council declares
22 systematically important. Too big to fail.

23 Texas reasonably doesn't want to invest
24 money in companies that if they fail are going to tank
25 the economy. Now, let's say the Federal government sets

1 out a policy memorandum that says, in our discretion, we
2 are not going to declare some insurance firms under a
3 certain size as too big to fail. We just don't think we
4 should. Okay?

5 Why can't the States sue that Federal agency
6 and say the law mandates that you tell us who's too big
7 to fail?

8 MR. KELLER: I don't think States would be
9 protected by laws governing which banks are too big to
10 fail, but States absolutely are protected by immigration
11 laws saying who is lawfully present within our borders.
12 And I think -- so that would be -- we did that under the
13 zone of interest test. So even if --

14 JUSTICE SOTOMAYOR: We already said in
15 Arizona v. Whiting that you can't tell the Federal
16 government who to say is legally or not legally present
17 here. You don't have a right to set immigration policy.

18 MR. KELLER: And that's precisely --

19 JUSTICE SOTOMAYOR: You're not in the zone
20 of interest of this -- of this -- of the immigration
21 law.

22 MR. KELLER: Oh, we absolutely are, and
23 that's precisely why I am standing here. Because as
24 the Court recognized in Arizona, just because the
25 Federal government pervasively regulates immigration,

1 that doesn't mean that the States don't have a
2 significant interest in who's within their borders. We
3 have an easily identifiable sovereign interest on who's
4 within our borders. However --

5 JUSTICE GINSBURG: But the State can't
6 remove anyone, and we still go back to the basic
7 problem: 11.3 million people. Congress is not
8 appropriating money to -- to remove more than -- what is
9 it? -- four million of them.

10 So there are these people that are -- who
11 are here to stay no matter what. And you have conceded
12 that the Federal government can say, low priority,
13 here's your card. Not going to deport you unless we
14 change our mind.

15 So the only thing that's involved is the
16 work, and you haven't challenged that separately.
17 You're challenging DAPA.

18 MR. KELLER: And -- and DAPA itself purports
19 to grant not only work authorization, but also transform
20 lawful conduct into lawful conduct.

21 JUSTICE GINSBURG: We've already gone
22 through that. We've -- we have agreed that that means
23 tolerated presence. The government has said, take out
24 that word. It was unfortunate that we used it. What we
25 mean is tolerated presence.

1 MR. KELLER: But it's not just an
2 unfortunate slip. When they're granting deferred-action
3 status, under their regulations, that is lawful
4 presence. So they want you to take out "lawful
5 presence" from the DAPA memo and pretend "lawful
6 presence" isn't in there. But then when you go into the
7 regulations --

8 JUSTICE KAGAN: But then why aren't you
9 challenging the regulations? I mean, I understand what
10 you're saying that DAPA in some sense triggers the
11 regulations, but only because the regulations say what
12 they say, that your real challenge is not to DAPA, which
13 is the nonenforcement part of this. Your real challenge
14 is to the regulations, the fact that nonenforcement
15 leads to a certain set of results and yet you're not
16 here challenging those regulations.

17 MR. KELLER: Well, insofar as you'd conceive
18 of our case of challenging those regulations, it would
19 be challenging them as applied to DAPA, but when
20 Congress --

21 JUSTICE SOTOMAYOR: The problem is that you
22 haven't exhausted administratively, and we always
23 require you to do that. There isn't an exception, as I
24 understand it, under the APA, for your failure to
25 exhaust your avenues in the agency first.

1 MR. KELLER: Well -- but this is -- we are
2 challenging DAPA. We are challenging that memo.

3 JUSTICE KAGAN: Can I -- please. Go ahead.

4 MR. KELLER: And when we bring forth that
5 suit, which only occurred as of November 20, 2014, just
6 because we're challenging DAPA's granting of deferred
7 action doesn't mean in the four narrow categories that
8 Congress has passed statutes allowing deferred action --
9 for VAWA self-petitioners, T- and U-visa applicants, and
10 widows and widowers -- that somehow we'd have to also be
11 challenging --

12 JUSTICE KAGAN: Do you think this? Suppose
13 that instead of doing DAPA, DHS had decided to go one by
14 one by one and it just -- you know, it sent a notice to
15 each person. Do you think at that point that -- that
16 DHS could also say, and this will include work
17 authorization because of our preexisting regulations?

18 MR. KELLER: Insofar as they were granting
19 lawful presence, no. Work authorization, I think at
20 most look, you'd look at, well, has there been
21 congressional acquiescence to this minimal program --

22 JUSTICE KAGAN: I guess -- I'm not sure I
23 understood the first part of that because let's just,
24 like, take out the labels. Just -- it notifies a single
25 person, you're low priority. We're not going to deport

1 you unless we change our minds. And by virtue of
2 preexisting regulations, you now can work on the books.
3 Is that legal? Could -- could DHS do that?

4 MR. KELLER: I don't think there's statutory
5 authorization. There may have been congressional
6 acquiescence to a practice in a -- very small cases
7 that's bridging lawful --

8 JUSTICE KAGAN: See, that's interesting
9 because I thought -- and as you said, there's not
10 statutory authorization with respect to that, and I
11 thought your entire argument is that they can't do this,
12 except for statutory authorization. And now you're
13 saying, well, in some cases they can do it.

14 MR. KELLER: Well, Justice Kagan, we have
15 multiple arguments. The first is a statutory argument.
16 And our backup argument, which is a response to the
17 Executive's congressional acquiescence argument, is that
18 at most, Congress would have acquiesced to a practice of
19 very small uses that were bridged --

20 JUSTICE KAGAN: And how about this? How
21 about DHS doesn't do it one by one. How about DHS says,
22 it's senseless to do it one by one. We should use some
23 categories. Here's the category. You've been here for
24 25 years. You're entitled to -- not entitled. You can
25 stay unless we change our minds.

1 So that's the category. So it's a smaller
2 category, but, you know, there's some -- there's a lot
3 of people in that.

4 MR. KELLER: If there was no previous lawful
5 status or an eminent lawful status, there's no way
6 Congress has acquiesced to that.

7 And if I can back up --

8 JUSTICE KAGAN: So wait a minute. So -- so
9 that's important. So -- so DHS could not say to all the
10 people who have been here for 25 years and perfectly law
11 abiding, Congress could not say to those, you know, tens
12 of thousands of people, let's say, not millions, tens of
13 thousands, all right, you -- we won't deport you unless
14 we change our minds, and you can work, you can feed your
15 families, you can do that. Congress -- DHS could not do
16 that?

17 MR. KELLER: Congress could. DHS does not
18 have statutory authority right now, of carte blanche
19 authority to grant lawful --

20 JUSTICE KAGAN: So this has nothing to do
21 with the scope of this policy. This has nothing to do
22 with, oh, how many millions of people are in this
23 policy. You're saying even with respect to a much
24 smaller policy of the kind that DHS or its predecessor
25 agencies have done literally every year for the last

1 three decades, that all of that was ultra vires.

2 MR. KELLER: Mr. Chief Justice, my time is
3 up.

4 CHIEF JUSTICE ROBERTS: Please, you may
5 answer the question.

6 MR. KELLER: When we're talking about the
7 scope of the program as opposed to bridging lawful
8 status, the scope goes to, is this a question of deep
9 economic significance? It also goes to when the 1987
10 work authorization was justified, the Executive was
11 telling everyone through the administrative process that
12 this was for a minuscule number of people, and it
13 wouldn't affect the labor market.

14 And this also brings to light that here, the
15 Executive didn't even use notice-and-comment in
16 promulgating this sweeping -- their theory is that they
17 can grant deferred action where there's not going to be
18 lawful status, that no court can review it, and they
19 didn't even use notice-and-comment procedure.

20 That is unprecedented, is a sweeping
21 assertion as Justice Jackson said in Youngstown. "It is
22 the duty of the Court to be last, not first to give up
23 the separation of powers."

24 CHIEF JUSTICE ROBERTS: Thank you, General.

25 MR. KELLER: Thank you, Mr. Chief Justice.

1 CHIEF JUSTICE ROBERTS: Ms. Murphy.

2 ORAL ARGUMENT OF ERIN E. MURPHY

3 FOR UNITED STATES HOUSE OF REPRESENTATIVES,

4 AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS

5 MS. MURPHY: Mr. Chief Justice, and may it
6 please the Court:

7 Three years ago the Executive asked Congress
8 to enact legislation that would have given it the power
9 to authorize most of the people that are living in this
10 country unlawfully to stay, work, and receive benefits,
11 and Congress declined.

12 Now the Executive comes before this Court
13 with the extraordinary claim that it has had the power
14 to achieve the same --

15 JUSTICE SOTOMAYOR: Excuse me. Was that
16 really all -- was that part of a package for a pathway
17 to citizenship?

18 MS. MURPHY: It was not a pathway to
19 citizenship. It was a pathway to lawful presence in the
20 country that would have allowed individuals to have a
21 legal status, to remain in this country, and Congress
22 has not created a legal status for the category of
23 individuals covered by DAPA.

24 JUSTICE SOTOMAYOR: That's correct. Why do
25 you think this is a legal status in the way that that

1 bill imagines?

2 MS. MURPHY: It is a legal status because
3 under the agency's own regulations, it is a status that
4 has consequences. And I would point you in particular
5 to 8 C.F.R. 1.3. This is the statute that defines the
6 term "lawfully present." Under that statute, if you are
7 in deferred-action status, you are lawfully present and
8 eligible for benefits.

9 Now that statute goes on to say if you are
10 just an individual as to whom DHS has declined to pursue
11 removal proceedings, you are not lawfully present. So
12 whether you are in deferred-action status makes a
13 difference under the agency's own regulations. It's
14 that affirmative act of not just forbearing and making
15 the decision not to remove somebody, but putting them
16 into deferred-action status that triggers the
17 availability of work authorization and eligibility to
18 receive benefits.

19 CHIEF JUSTICE ROBERTS: So why don't we just
20 cross -- why don't we just cross out "lawfully present,"
21 as the SG has suggested?

22 MS. MURPHY: You can't cross it out and
23 achieve what DAPA is supposed to achieve, because what
24 really matters in DAPA is that it is allowing the grant
25 of deferred-action status.

1 Whatever the Executive wants to label that,
2 under its own regulations, deferred-action status is
3 equated with lawful presence. So if you cross it out of
4 the DAPA memo, it's still part of the regulatory scheme
5 that says once we've taken this extra step, not just of
6 deferring the removal of you, but of putting you into
7 this status, that changes your eligibility for work
8 authorization and benefits in this country. And once
9 the Executive is doing that, we are far outside the
10 notion of mere enforcement discretion.

11 JUSTICE GINSBURG: But you would agree with
12 the clause that says low priority, that -- that --
13 nothing about work authorization, nothing about Social
14 Security, if you are low priority, which means we'll
15 probably never get to you because Congress hasn't given
16 us the money to remove you.

17 MS. MURPHY: Well, we would not necessarily
18 concede that you could actually grant people cards that
19 say we're not going to enforce the law as to you. But
20 that's all not at issue in this case, because what the
21 Executive wants to do is something much more than that.

22 If all they wanted to do was say we're not
23 going to enforce as to you, the only memo they would
24 have issued is the Enforcement Priorities Memo, because
25 in order to qualify for DAPA, you have to already not be

1 an enforcement priority under the Enforcement Priorities
2 Memorandum.

3 What the Executive wanted to accomplish was
4 something more: To say not only are you not an
5 enforcement priority, but we want you to be eligible to
6 work and to receive benefits. And the way that we do
7 that is by taking this affirmative act of converting you
8 into a status that, under our own regulation, changes
9 your eligibility --

10 CHIEF JUSTICE ROBERTS: Well, we'll hear in
11 a second --

12 JUSTICE KENNEDY: Why wouldn't the
13 appropriate way for Texas to proceed have been to
14 challenge the regulation under the APA -- I think it's
15 Section 553 -- and then if there were concern about
16 notice-and-comment taking too long, asking for a
17 preliminary injunction?

18 MS. MURPHY: I -- I don't think that's the
19 way that it actually makes sense for this to proceed,
20 because there's nothing inherently problematic about a
21 regulation that ties deferred-action status to work
22 authorization.

23 Congress has passed multiple statutes --

24 JUSTICE KENNEDY: Well, but the point -- the
25 point of the suit, I guess -- I'm not going to tell

1 people how to design their suit -- the point of the suit
2 would be the -- the areas of discretion have been so
3 vastly changed that the regulation now -- now has
4 been -- has been superseded.

5 MS. MURPHY: And I don't mean to suggest
6 that that's not a way you could challenge. But I don't
7 think it's the way you have to challenge this, because
8 to me, the real problem is not the linking of
9 deferred-action status and work authorization, it's the
10 abuse of deferred-action status. That's not a power
11 that includes the power to grant deferred action status
12 to individuals who are on -- on a class-based program --

13 JUSTICE GINSBURG: Then you disagree with
14 General Keller, because I think he did say -- came up a
15 few times, it's in his brief -- you could give an ID
16 card to these people saying low priority -- the whole
17 category of people, give them that. But you can't give
18 them work authorization or Social Security.

19 MS. MURPHY: What I would say is we would
20 have concerns if this case were challenging just the
21 Enforcement Priorities Memorandum, and we would have the
22 same concerns if you had that and invited people in and
23 gave them an enforcement priority card.

24 That's not what this case is challenging.
25 So ultimately, whether the House has concerns about the

1 Enforcement Priorities Memorandum is really beside the
2 point here, because what this case is challenging is the
3 DAPA memorandum that goes beyond the mere enforcement
4 discretion --

5 JUSTICE SOTOMAYOR: So can we -- can we take
6 it -- break it down?

7 MS. MURPHY: Sure.

8 JUSTICE SOTOMAYOR: Are you arguing that the
9 Executive does not have the power to defer -- to defer
10 action of removal against this class of aliens?

11 MS. MURPHY: It all depends by what you mean
12 by "defer action."

13 JUSTICE SOTOMAYOR: I just said deferred
14 action, but they're not --

15 MS. MURPHY: Well, I can't answer the
16 question unless I understand whether you're talking
17 about mere forbearance or putting them into
18 deferred-action status.

19 We don't believe the Executive has the power
20 to put this class of individuals into deferred-action
21 status. First of all, there's plainly no statutory
22 authority to do so. But even if you get into the world
23 of their congressional acquiescence theory, the types of
24 deferred-action status programs that existed in the past
25 are fundamentally different, both in kind and in scope,

1 from this one.

2 Before 1997, you didn't even have
3 class-based deferred-action programs. All of the
4 programs they're talking about pre-1997 are exercises of
5 different powers, powers pursuant to statutes that
6 existed at the time, such as the voluntary departure
7 statute that no longer is a path for Executive --

8 JUSTICE BREYER: Can I -- can I ask you
9 this, then? Because you're an amicus; you're not a
10 party. It's Texas who's the party, and they've made
11 their objections.

12 But suppose we played -- suppose I picked up
13 your thought and also coupled it with what the SG said,
14 cross out the words that say "special status." And
15 suppose that would it work to say, look, the question is
16 whether Texas has standing to complain about simply the
17 change in priorities for action. We don't know yet if
18 that affects driver's licenses, or could, or could
19 affect benefits, or will. But should the Administration
20 do so, then they might have a case that they could bring
21 challenging that aspect of the situation.

22 All we're saying is that they do not have
23 that case now, given the SG's concession or agreement or
24 desire to strike those words out. Does that work or
25 not, in your opinion?

1 MS. MURPHY: I'm not sure I completely --
2 I'm sorry.

3 JUSTICE BREYER: If I am not clear, I will
4 not repeat it, but you can forget it.

5 MS. MURPHY: No, no. I want to be
6 responsive. I just want to be sure I understand the --
7 the question.

8 I mean, I think -- I -- I -- I guess my
9 point is that I don't think anything, either in Texas's
10 view of the case, or in our view of the case, that turns
11 on these words "lawful presence" being in the DAPA
12 memorandum, because what matters is the DAPA memorandum,
13 as it says, is designed to make it a path for
14 individuals to be eligible for work authorization, and
15 without DAPA they're not.

16 And it's also a path to make them -- I mean,
17 once they are in deferred-action status, that is why
18 they are considered lawfully present. You're not
19 considered lawfully present just because the Executive
20 is not actively pursuing removal proceedings against
21 you.

22 Again, C.F.R. -- 8 C.F.R. 1.3, it
23 specifically says the decision not to pursue a removal
24 proceeding does not render you lawfully present. So it
25 matters. You know, the -- the words that were used

1 here, and the program being created, matters. It's not
2 enough to have mere forbearance. You need this
3 additional step to achieve what the Executive wants to
4 accomplish.

5 JUSTICE SOTOMAYOR: So your position is that
6 in 1989, when George H. W. Bush granted deferred
7 enforced departure for Chinese residents after the
8 Tiananmen Square situation, that he acted illegally?

9 MS. MURPHY: No. Because that program was
10 justified on a different power than the power here. It
11 was deferred -- that -- the deferred enforced departure
12 in Article II --

13 JUSTICE SOTOMAYOR: But there was no
14 statutory authority for him to do that.

15 MS. MURPHY: It is a power that the
16 Executive has always grounded in Article II foreign
17 affairs power. A nationality, country-based concern
18 power.

19 Now, there's currently a statute on the
20 books, the temporary protected status statute, that says
21 it is the exclusive authority through which the -- the
22 Executive can grant nationality based, but --

23 JUSTICE SOTOMAYOR: That came after this.

24 MS. MURPHY: Right. And at the time, that
25 statute didn't exist --

1 JUSTICE SOTOMAYOR: At the time, there was
2 no statutory authority.

3 MS. MURPHY: Whatever was happening before
4 1990 doesn't tell you very much about what Congress has
5 acquiesced in when Congress passed a statute in 1990
6 that said these are the circumstances under which you
7 can grant --

8 JUSTICE SOTOMAYOR: I -- I appreciate that.
9 And that may be what Congress does here. It may come
10 back and say deferred action is limited in this way.
11 But it hasn't yet.

12 So assuming that we have a history of
13 deferred action for categories of people, then what
14 you're really arguing about it -- and you -- and I
15 stopped, or you got interrupted when you were answering
16 me earlier -- why are you -- are you arguing that the
17 1986 regulation, which gives the Attorney General the
18 right to grant work authorizations to individuals who
19 have been provided deferred action, are you arguing
20 that's unconstitutional?

21 MS. MURPHY: No. Because there are statutes
22 on the books that say deferred action status also comes
23 with work authorization. So, of course --

24 JUSTICE SOTOMAYOR: Except that the statute
25 says that the -- those people, deferred action, can be

1 granted under the statute --

2 MS. MURPHY: Yes.

3 JUSTICE SOTOMAYOR: -- or by the Attorney
4 General.

5 MS. MURPHY: I'm not --

6 JUSTICE SOTOMAYOR: The ones if -- you're
7 striking out by the Attorney General?

8 MS. MURPHY: I was talking about different
9 statutes, not 1324a(h)(3). I was talking about the
10 statutes that actually refer to deferred action. And
11 they say that the Executive can grant deferred action
12 and work authorization. So there's nothing inherently
13 problematic about a regulation that implements
14 Congress's precise understanding that in the
15 circumstances where the Executive is authorized to grant
16 deferred action --

17 JUSTICE KAGAN: Ms. Murphy, suppose
18 something is not statutorily authorized. Suppose --
19 this is a version of the hypothetical that I gave to
20 General Keller. Suppose DHS decided to do this one by
21 one by one. And in doing it one by one by one, also
22 said and you're entitled to work on the books. Could --
23 could DHS do that?

24 MS. MURPHY: I think it would -- it would
25 ultimately in that instance start to become a question

1 of scope and a point at which you have a policy that is
2 inconsistent with the use of deferred action status.
3 Because in the past, I mean, there have been this kind
4 of ad hoc de minimis, case-by-case use of deferred
5 action status.

6 JUSTICE KAGAN: Okay. So suppose, then --
7 again, same kind of question that I gave to
8 General Keller. Suppose that there was a policy, but it
9 was of much less significance scope. Let's say a policy
10 that said if you've been in the United States for 30
11 years and you have children here, we're not going to
12 deport you unless we decide otherwise, and you're
13 entitled to work on the books. Could DHS do that?

14 MS. MURPHY: No. There is not any
15 congressional authority that allows it, and there is no
16 past practice like it.

17 JUSTICE KAGAN: But this is very
18 significant, right? No past practice like it? I
19 mean --

20 MS. MURPHY: There's not any past practice.

21 JUSTICE KAGAN: What was that family --

22 MS. MURPHY: That was not a --

23 JUSTICE KAGAN: -- policy -- fairness?

24 MS. MURPHY: -- voluntary departure. There
25 was a statute on the books at the time that permitted

1 extended voluntary departure. You no longer can do
2 that. There is no past deferred action program that was
3 for a category of individuals that had no path to loss
4 of status.

5 JUSTICE KAGAN: So, but this is important.
6 Because you're -- you're basically saying that DHS,
7 going forward, any administration cannot have any kind
8 of policy, even if it's limited, much more limited than
9 this kind of policy is that allows undocumented aliens
10 to work.

11 MS. MURPHY: Congress has passed a statute
12 that says if you are living in this country without
13 legal authority, you cannot work. That's Congress's
14 policy judgment in 1324a.

15 JUSTICE KAGAN: That's --

16 MS. MURPHY: You may disagree with --

17 JUSTICE KAGAN: Yeah, yeah, yeah. I
18 understand the point. All, I guess, I'm just saying is
19 this would be an enormous change in practice.

20 MS. MURPHY: Not at all, Your Honor, because
21 the past practices, there are none. They have not
22 pointed to a single deferred action program that granted
23 it to a class of individuals who had no lawful path to
24 status in this country.

25 JUSTICE GINSBURG: Is that true of all other

1 deferred actions mentioned in the Appendix, the one that
2 the Congressional Research Service did?

3 MS. MURPHY: Yes. Most of those are not
4 deferred action programs. They're extended voluntary --

5 JUSTICE GINSBURG: I mean, they are
6 different.

7 MS. MURPHY: There's really -- there's only
8 about four deferred action programs that were
9 class-based. Those all were path to lawful status.
10 U visas, T visas, people who held F1 visas during
11 Hurricane Katrina.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 Five minutes, General Verrilli.

14 REBUTTAL ARGUMENT OF GENERAL DONALD B. VERRILLI, JR.

15 ON BEHALF OF THE PETITIONERS

16 GENERAL VERRILLI: Thank you, Mr. Chief
17 Justice.

18 First, on standing, I would note that they
19 have no answer to our redressability point. You didn't
20 hear one today. They don't have one.

21 Second, even if you think they got over the
22 Article III hurdle, there's just no way that this
23 license cost injury constitutes something within the
24 zone of interest in any provision within the APA, and
25 they haven't tried to establish that.

1 And then third with respect to standing, I
2 think Justice Breyer's point about the analogy between
3 the kind of theory that they are advocating here and
4 taxpayer standing and *parens patriae* is dead on correct.
5 This would invite exactly the same kind of flood of
6 litigation that you have always said Article III is
7 designed to prevent, and if you want proof of that, it
8 already exists. Texas is already using this theory to
9 sue the United States based on the resettlement of
10 Syrian refugees in Texas, and that will just be the
11 beginning.

12 Now, Justice Alito, you raised a couple of
13 points I want to get to with some specifics. You asked
14 about whether an employee with a deferred action work
15 authorization could sue if an employer refused to hire.
16 I would direct Your Honor to 8 U.S.C. 1324b. Actually,
17 Congress has determined the situations in which an
18 employee -- well, with -- an alien with work
19 authorization has a discrimination claim and when the
20 employee doesn't. That statute says if you're a lawful
21 public resident, you do. Deferred action is on the side
22 where you don't.

23 JUSTICE ALITO: Well, I was asking about
24 Section 1981.

25 GENERAL VERRILLI: Well, but I think that if

1 you have a -- you'd have a hard time making that claim
2 given that Congress has made that kind of a judgment.

3 Now, with respect to another point

4 Your Honor made --

5 JUSTICE ALITO: So your position is that --
6 that there could not be a suit under 1981.

7 GENERAL VERRILLI: What I'm saying is that
8 Congress made a judgment there that -- that bears very
9 directly on it.

10 But now, with respect to another point that
11 Your Honor raised about specific statutory references to
12 lawful presence, my friends on the other side made a
13 huge deal about this, in particular 8 C.F.R. 1.3, which
14 I think they cite seven or eight times.

15 I urge you to go to look at it. I urge you
16 to, in fact, read the rulemaking order that went along
17 with it from -- from 1996. What you'll -- you'll see
18 what it says, that it applies to one thing and one thing
19 only. That's the accrual of Social Security benefits
20 under Section 1611(b). And the rulemaking order -- and
21 we quoted this in our reply brief -- specifically says
22 that although we're counting deferred action as lawful
23 presence for the purpose of accruing Social Security
24 benefits for the reason that if you can work lawfully,
25 you ought to be able to accrue benefits. This does not

1 confer any lawful status under the immigration laws. It
2 specifically says that.

3 And so we can argue about whether the
4 Executive has the authority to consider people with
5 deferred action as lawfully present in that narrow
6 sense. We think we're right. Maybe they're right, but
7 that is the tail on the dog here. That's not --

8 JUSTICE ALITO: Well, if you -- if the
9 phrase "lawful presence" were stricken from the
10 Guidance, would you take the position that DAPA
11 beneficiaries are not lawfully present for purposes of
12 -- under certain statutes that use that phrase for the
13 re-entry bar, for eligibility for Federal benefits?

14 GENERAL VERRILLI: It's -- the only Federal
15 benefit is Social Security.

16 JUSTICE ALITO: Well, would you say they
17 were lawfully present for those two statutory purposes?

18 GENERAL VERRILLI: No. There are
19 regulations that say that they are, but we -- and we can
20 fight about that. But that doesn't -- but that -- as I
21 said, that is the tail on the dog.

22 Now, if I could go to the merits.
23 Repeatedly, you've heard that the Family Fairness policy
24 was pursuant to statutory authorization. That's just
25 flat wrong. There's a D.C. Circuit case, and you can

1 read Judge Silberman's opinion in that case that we cite
2 at page 49 in our brief which specifically describes it
3 as extra-statutory, which is what it was.

4 Now, the other key point, and I think this
5 is really important. Their theory about the scope of
6 who can get work authorization is that either Congress
7 has to specifically say you get work authorization, or
8 Congress has to specifically authorize the Attorney
9 General, now DHS, to get -- to grant -- to decide
10 whether people in this particular category can get work
11 authorization.

12 Forget about deferred action. There are
13 millions of people who get work authorization under
14 existing law now who -- who couldn't get it if -- if
15 that were the proper interpretation of the law. These
16 millions of people are in proceedings for adjustments of
17 status. The hundreds of thousands of people who are in
18 proceedings for cancellation of removal. The hundreds
19 of those of people that have parole. None of those
20 people qualify under reading of the statute.

21 That is why in 1987, when -- when INS had a
22 rulemaking proceeding about this, they rejected it. It
23 would completely and totally upend the administration of
24 the immigration laws, and, frankly, it's a reckless
25 suggestion. And it just -- and -- and they

1 just never --

2 JUSTICE SOTOMAYOR: People who have asylum
3 don't have a pathway to citizenship.

4 GENERAL VERRILLI: Exactly. And there are
5 all kinds of statuses that don't qualify as lawful
6 status that people have always been allowed to get work
7 authorization during the period in which -- time where
8 their presence is tolerated.

9 CHIEF JUSTICE ROBERTS: How -- how many
10 people are we talking about with those?

11 GENERAL VERRILLI: Millions. Millions.
12 There are --

13 CHIEF JUSTICE ROBERTS: The asylum
14 applications?

15 GENERAL VERRILLI: No, but the adjustment of
16 status, 4.5 million since 2008, and cancellation
17 removal, 325,000 since 2008. Huge numbers.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, General.
20 The case is submitted.

21 (Whereupon, at 11:36 a.m., the case in the
22 above-entitled matter was submitted.)

23

24

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